Supreme Court, U.S.
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No. 86-2009

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ITEL CONTAINERS INTERNATIONAL CORP.;
GENSTAR CONTAINER CORP.; FLEXI-VAN LEASING, INC.;
INTERPOOL LIMITED; TRANSAMERICA ICS INC.;
and NAUTILUS LEASING SERVICES, INC.,
Petitioners,

vs.

M/V C.C. SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Should a maritime lien for unpaid container rentals be created against a vessel where the containers onboard were never "furnished" to the vessel by the container lessor but were only some of many thousands previously supplied in bulk to the vessel operator for general use in its intermodal transportation business?

LIST OF PARTIES

Respondent concurs in Petitioners' List of Parties. Char Yigh Marine (Panama) S.A., claimant of C.C. SAN FRANCISCO *in rem* has no subsidiaries or affiliates; its parent company is SB General Leasing (Hong Kong) Co., Ltd.

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and NAUTILUS LEASING SERVICES, INC.,
Petitioners,

VS.

M/V C.C. SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.,
Respondents.

Char Yigh Marine (Panama) S.A., appearing restrictively under Federal Rules of Civil Procedure Supplementary Admiralty Rule E(8) as claimant to C.C. SAN FRANCISCO, a vessel *in rem,* respectfully urges this Court to deny the petition for certiorari, on the basis of *Piedmont & Georqe's Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U.S. 1 (1920).

The lower court opinion denying a maritime lien is reported at 808 F.2d 697 (9th Cir. 1987).

JURISDICTION

The Ninth Circuit has refused to recall or to stay its mandate, which has been returned to the District Court for action. The Circuit's instructions are "for further proceedings as may be necessary to discharge the lien." The mandate will be spread on or after August 3, 1987 at which time it is within the District Court's power to discharge the security and to extinguish subject-matter jurisdiction *in rem.*

STATEMENT OF THE CASE

The six petitioners are lessors of containers for use in intermodal transportation. They leased enormous quantities of containers to C.C. Line, a Taiwanese operator of container ships, for use in its intermodal service from ports in the Far East to all points in the United States.

Once C.C. Line took possession of these intermodal containers from the lessors, C.C. Line had unrestricted authority to designate their use, including which containers would be placed onboard any of its vessels, and when. This is consistent with industry practice worldwide: containers are fungible, with standard dimensions, and are routinely carried by a combination of vessel, truck and rail for delivery to points far inland. Containers are not generally dedicated to the use of one vessel, but are carried intermodally on whatever truck, chassis, flatcar, barge or vessel as may be necessary to complete their various journeys.

Petitioners invoiced C.C. Line monthly for the *per diem* charges for all containers and chassis on hire the previous month. No segregation of invoice charges was made by vessel, nor by time at sea or time on land, and no vessels were identified in any invoice.

C.C. Line fell into default on its payments of container and chassis hire to the lessors, who summarily arrested C.C. SAN FRANCISCO in August, 1984.[1] C.C. Line defaulted, and is defunct; Char Yigh, the vessel's owner, and unrelated to C.C. Line, was forced to post security for the release of its vessel.[2]

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[1] At that time, there was no judicial review of the factual basis for the warrant of arrest prior to arrest.

[2] The container lessors' claims were initially enormous, even *in rem* exceeding $20 million. These claims were subsequently dramatically modified, and are now believed to be less than the outstanding $2.2 million security.

Very soon after the arrest, Char Yigh contended that no maritime lien existed under the *Piedmont* doctrine. The District Court disagreed. The Ninth Circuit reversed the District Court and applied the *Piedmont* doctrine to deny the novel, intermodal lien sought by petitioners.

> "Accordingly, we hold that cargo containers leased in bulk to a time-charterer of a group of vessels for unrestricted use on board the vessels in that group, are not furnished to any particular vessel of the group, on which they subsequently happen to be employed, within the meaning of 46 U.S.C. §971." 808 F.2d at 703 (9th Cir. 1987).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Piedmont Decision of 1920 Is Still Good Law, And Has Not Been Modified Subsequently In Any Respect.

The Ninth Circuit ruled that the original general delivery of fungible containers to a ship operator, coupled with the intervening independent judgment of the containership operator in selecting the particular carrying vessel from his fleet, prevented any maritime lien arising against the carrying vessel.

The Ninth Circuit expressly relied for its decision on *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920), a unanimous decision of this Court which, while predating the invention of containers, clearly stated the principle involved, under general maritime law and under the Federal Maritime Lien Act, codified at 46 U.S.C. §971-75.[3]

In *Piedmont*, the commodity was bulk coal, subsequently used aboard several vessels; in the present case, the commodity

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[3] Because these containers were delivered abroad, on land, to Taiwanese and Hong Kong companies for use with Panamanian vessels, we do not believe the Federal Maritime Lien Act applies *ex proprio vigore*. But since the Act did not amend general maritime law principles of "furnishing", cases under the Act are as apposite as general maritime lien law cases.

is bulk containers, subsequently used aboard numerous C.C. Line vessels. The item has changed, but the principle has not: a lien is a property right in a particular vessel and arises from services devoted to the particular needs of that particular vessel at the time of service. It is not a general security interest and does not extend to the provision of general services to the vessel's operator.

Lien rules are strict because the lien is secret, unrecorded, and easy to assert in retrospect.[4] The lien is perfected by an extraordinary summary arrest, with connotations of insolvency and unreliability wholly absent from a UCC-1 security interest filing. The lien is frequently created in obscure situations at unusual times and in faraway places. Often the parties who contest the lien, being the shipowner and other lien holders, did not incur the lien and have no knowledge of it until the seizure.

The owner needs assurance that the goods or services were supplied to his particular ship, and not to some other vessel in the operator's fleet. The present shipowner, for instance, may be prejudiced by liens allowed by an earlier shipowner (since liens are indelible), or by liens incurred (as alleged here) by the defunct time-charterer of the vessel. The other genuine lien creditors need confirmation of dates of supply and amounts of lien for the ranking of relative priorities, both between themselves, and as against a mortgage holder.

Therefore, the rule exists that the lien must be seen to arise objectively, through the manifestation of a contemporary intent to supply a particular item to a particular vessel.[5] Any other

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[4] Justice Brandeis' elegant phrase that the maritime lien is *"stricti juris*, and will not be extended by construction, analogy or inference" will be found in varying forms in many cases. They are originally based on Justice Curtis' statements in *The Kiersage*, 14 F. Cas. 466, 467 (D. Me. 1855)(No. 7,762).

[5] Now that the latest amendments to the Supplemental Admiralty Rules require judicial review of the apparent validity of the complaint before arrest (Rule C(3) effective August 1, 1985), the District Judge also needs the objective assurance of specific supply of particular items to a particular ship, supported by contemporary invoices or delivery records.

rule would lead itself to the very real risk of fraudulent or collusive lien claims.

Justice Brandeis, and the unanimous Court for which he wrote, invoked very basic principles of lien theory for his view that no maritime lien should be granted, and cited well respected authority such as *The Alligator,* 161 F. 37 (3rd Cir. 1908) and *Astor Trust Co. v. E.V. White & Co., Inc.,* 241 F. 57 (4th Cir. 1917) which dealt with similar problems, and found no lien.[6]

Justice Brandeis then demolished the theory that the (new) federal maritime lien act was intended to broaden the scope of the lien, finding that the language of the statute afforded no basis for that assertion, while the Reports of the Committees of Congress showed that it was unfounded:

> "The reports expressly declare that the bill makes 'no change in the general principles of the law of maritime liens, but merely substitutes a single statute for the conflicting state statutes'." 254 U.S. at 11-12.

No subsequent amendment to the Act has, in any way, addressed *Piedmont:* the statutory record is devoid of any suggestion that *Piedmont* was being questioned, overruled or modified. *See* Maritime Lien Act of 1920, ch. 250, §30, 41 Stat. 1005 (1920), *as amended by* Act of Aug. 10, 1971, Pub. L. No. 72-79, 85 Stat. 285 (1971).

Cases subsequent to *Piedmont* have simply clarified its general rule. In *Banker's Trust v. Hudson River Day Lines,* 93 F.2d 457 (2d Cir. 1937), a unanimous panel (of Judges Learned Hand, Augustus Hand and Swan) denied a lien for

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[6] Of cases in this vein, *The Bethulia,* 200 F. 879 (D. Mass. 1912) is clear, simple, subsequently ratified in *Walter E. Heller & Co. v. M/V MR. ED,* 273 F. Supp. 926 (E.D. La. 1967), and exactly reflected in *Kopac v. Bold Venture,* 1987 AMC 192 (W.D. Wash. 1986).

"fuel undesignated as to destination except that it was for vessels of the buyer's fleet." 93 F.2d at 457. The supplies were distributed by the buyer in its discretion, and the seller made no attempt to deliver the fuel directly to any vessel, nor to invoice any vessel for fuel used onboard. The same lack of direct supply prevents a lien here. In *D/S A/S Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940), a lien was found to exist where significantly different facts from *Piedmont* and *Banker's Trust* were found—the oil supplier had delivered its oil to a holding facility, which it controlled, in the vicinity of the ships; thereafter, oil was supplied to specific vessels, identified as so supplied, and promptly invoiced to them for their account. These are not the facts in our case.

Piedmont, Dannebrog and *Banker's Trust* establish the principle that while supplies can be delivered in mass to the owner of a fleet under a single contract, they must be expressly ordered by the owner and "delivered to him by the supplyman for the use of *named vessels* in *specified portions.*" in order for a lien to arise. *Banker's Trust,* 93 F.2d at 458 (emphasis in original).[7]

Petitioners have consistently relied on a disparaging comment in the second edition of *Gilmore & Black's* admiralty textbook to limit *Piedmont*—but have been seduced by the quotability of the phrases, and have not examined the sense or the footnotes. Those two professors agree that *Piedmont* stands, ineluctably, for the *stricti juris* principle that a lien cannot be created by analogy or inference, and requires that the necessary supplies be furnished *to* the specific vessel *by* the lien

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[7] The Ninth Circuit's dissent appears to have overlooked *Banker's Trust,* and so to have misunderstood the comment in *Piedmont* allowing use of a general supply contract. The form of the contract is irrelevant; instead, it is the subsequent act of supplying particular items for the needs of a particular vessel which creates the lien.

See also The American Eagle, 30 F.2d 293 (D. Del. 1929).

claimant, with copious reference to *Banker's Trust. (Gilmore & Black, The Law of Admiralty, (2d Ed. 1975), §9-36, pp. 661-2).*

Further, contrary to the petitioners' assertions, there is no conflict between circuits by virtue of the Fifth Circuit's decision in *Equilease Corporation v. M/V SAMPSON,* 793 F.2d 598 (5th Cir. 1986 *en banc).* Analysis of *Equilease* shows the conflict exists only in *obiter dictum* of the Fifth Circuit as to the scope of the "furnishing" doctrine, since the facts show that marine insurance was furnished to specific vessels.[8] *Equilease* involves the interpretation of 1899 Fifth Circuit authority, whether it remained correct under Louisiana law to deny a maritime lien for unpaid insurance premiums on specific vessels: it does not involve the general supply of containers for unconstrained intermodal use. The doctrine of conflict requires a true conflict, on the facts, (*see Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 392-93 (1923); R. Stern, E. Grossman & S. Shapiro, *Supreme Court Practice,* (6th Ed. 1986), pp. 196-97), and not merely a philosophical or apparent conflict as to the scope in general of the "furnishing" doctrine.

Piedmont is not an aberrational decision, nor has it been judicially restricted. It is compatible with maritime practice elsewhere. Petitioners stress that their containers ". . . are carried by their lessee ship operators to the four corners of the globe." Petition at 5. Therefore, it is of more than passing interest that English law and practice forbids the arrest of a containership for unpaid container rentals. *See, Gatoil International, Inc. v. Arkwright-Boston, etc.,* [1985] 1 All E.R. 129 (H. of L.) expressly overruling the contrary case of *The Sonia S,* [1983] 2 Lloyd's Rep. 63 (C.A.). Containers cross national boundaries on trucks and railroads, yet no railroad and no truck lien exists, nationally or internationally. It would be a needless anomaly to create a special rule against vessels, in the United States, alone.

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[8] 793 F.2d at 600. *Equilease* is an abnormally recondite case even for admiralty.

Finally, the comments of the present administration in opposition to any expansion of the maritime lien are worthy of note:

> "Nothing compels stevedores and others to extend credit to those who they determine are not credit worthy.
>
> Requiring payment in advance, bonds or letters of credit are standard commercial practices which can be utilized in situations where concern exists whether a vessel or its owner will pay its bills." [9]

We suggest the rule of *Piedmont* is clear and denies a lien to the petitioners here.

2. Something More Than A Mere Denial of Certiorari Is Needed.

This is not such a case as meets the considerations governing review on certiorari under Supreme Court Rule 17.1. The Ninth Circuit's interpretation of *Piedmont* and of the Maritime Lien Act is correct and, in ordinary circumstances, it would be sufficient for this Court to deny *certiorari.* But a denial of *certiorari* of itself has neither precedential nor directive value.

It is suggested that this is such a case as should be disposed of by "a summary disposition on the merits" under Supreme Court Rule 23.1 in order to give guidance to the Circuits. Such an action is unusual, but not unprecedented, and has been used in the past to reaffirm Court decisions of long standing.[10]

Substantial hardship would be caused by awaiting the traditional conflict between circuits. The claimed container lien is novel, and is disproportionately large in its aggregation of

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[9] *Hearings on H.R. 1307 Before Subcomm. on Merchant Marine of the House*, 98th Cong., 1st Sess. 559 (May 20, 1983) (statement of Stuart Breidbart, Chief Counsel MARAD).

[10] The Court has taken such action in the past "to clarify whatever uncertainty might exist" where a longstanding rule has been attacked. *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 650 (1977).

millions of dollars of rental, repairs, renovation and losses. Its potential existence in other circuits discourages entrepreneurial ship finance, since the claimed lien "primes" and overwhelms any foreign mortgage; its actual existence would work a hardship on those traditional, small businessmen (ship chandlers, victuallers, repairmen, stevedores, fuel suppliers) genuinely covered by the Maritime Lien Act. Their liens, in most cases, possess a certain priority over the mortgage and so have a value even when the vessel is worth less than its mortgage. But, if the container lessors have their way, these liens would be effectively devalued to the point of extinction on containerships, since they would be overwhelmed by the equally ranking, but enormous, container rental liens. Such a lien would not exist on trampships, bulk carriers, car carriers, tankers and the like, and so there would be created a cruel and anomalous discrimination against traditional lien suppliers to containerships, only. Indeed, if this Court awaits a conflict between Circuits, such a preventable anomalous result must be accepted.

The Ninth Circuit has denied the lien, but the other circuits are silent. Continued uncertainty will foster injustice. A short sharp arrest, or even the threat of one, is well known in admiralty: the adverse effect of an arrest on business, on scheduling of vessels, on credit is so severe that a ship operator will generally knuckle under. The imputation of bankruptcy that accompanies publication of the arrest is a powerful weapon. The more resolute, or desperate, container lessors can be expected to make such threats in other circuits despite the Ninth Circuit's position.[11] Even a subsequent loss in another Circuit may be no real deterrent where the ship operator (like C.C. Line here) has been put out of business by the fanfarronade of an invalid arrest.

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[11] The threat already exists in the Petition:

> "A container lessor may be unable to enforce a claimed maritime lien against a vessel detained at Los Angeles, but may be able to enforce the claimed lien against that same vessel if it calls, for instance, at New Orleans". Petition at 12.

Equally, if the operator survives, negotiation of settlement is such an ingrained habit in admiralty that few of the actual or threatened arrests are likely to reach trial, and fewer still to move on to appeal. So the industry is likely to be in confusion for many years if *certiorari* is silently denied here, with the advantage (except in the Ninth Circuit) going to the aggressors, the lessors.

Full consideration of the issues will not be slighted by review here on the basis of the *certiorari* petition. The facts are not in dispute, are simple and straightforward and accurately reported by the Ninth Circuit. Six of the largest container lessors are involved in the present action, and have fully briefed their issues in the District Court and in the Ninth Circuit. Because of the central position of *Piedmont,* the petition for *certiorari* is already petitioners' brief on the merits. They have coordinated their approach with, and are reported to have the active assistance of, their trade association, the Institute of International Container Lessors. The Circuit opinion also contains a reasoned dissent addressing *Piedmont* which, we all agree, is the lynchpin.[12] Consequently, the Court is faced with a fully articulated issue.

Piedmont established the rule, consistently adopted thereafter, that a lien supplier has to deliver and earmark specific goods for use on specific vessels. The supplier loses his lien if he delivers goods to the ship operator generally and permits the operator to designate the receiving vessels. The lien arises from the particular vessel needs of the ship at the time and place of supply, and not from the general business needs of the operator.

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[12] We believe the dissent misconstrues *Piedmont* and suggest the best argument in reply is found in *Banker's Trust Co. v. Hudson River Day Line,* 93 F.2d 457 (2d Cir. 1937).

The rule of *Piedmont* is as logical and apposite today as it was in 1920; it has lost none of its correctness in the intervening sixty-seven years. No principles would be changed by a reaffirmation of the validity of a well-respected case, while much future unnecessary expense and business interruption would be avoided.

CONCLUSION

The Court is urged to deny *certiorari* stating in its order that it is doing so on the basis of *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920).

DATED: July 20, 1987

Respectfully submitted,

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By David E. R. Woolley
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CHAR YIGH MARINE (PANAMA) S.A.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and am over the age of eighteen years and not a party to the within action or proceeding, that my business address is c/o Pandick, California, 1900 South Figueroa Street, Los Angeles, California 90007, that on this 20th day of July, 1987, I served the within RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI in the said action and by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 20, 1987 at Los Angeles, California.

By: Mark M. Schaefer

Mark M. Schaefer